Neutral Citation Number: [2020] EWHC 1657 Ch)

Claim No: CH-2019-000183

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 26 June 2020

Before:

STUART ISAACS QC (sitting as a Deputy Judge of the High Court)

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Between:

Infinity Distribution Ltd (in administration)

Claimant/Respondent

- and –

The Khan Partnership LLP

Defendant/Appellant

- -
- -

Mr Dan Stacey (instructed by The Khan Partnership LLP) appeared on behalf of the Appellant.

Mr Albert Sampson (instructed by Candey Limited) appeared on behalf of the Respondent.

Hearing date: 24 June 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 2pm on 26 June 2020.

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Stuart Isaacs QC:

1. This is an appeal by the defendant, The Khan Partnership LLP ("TKP"), against the order dated 22 May 2019 of deputy master Arkush ("the master") by which he ordered that a proposed deed of indemnity offered as security for TKP's costs in proceedings begun against TKP by the claimant ("IDL") was adequate and acceptable security.

2. TKP is a firm of solicitors which is the successor practice to Hassan Khan & Co, which formerly acted for IDL in connection with an HMRC investigation into potential VAT fraud by mobile telephone traders. At all material times, IDL (which is now in administration and insolvent) was a wholesale supplier of mobile telephones. TKP was successful in obtaining for IDL a repayment from HMRC of input VAT which was paid into TKP's client account.

3. In the proceedings, IDL alleges that TKP acted in breach of fiduciary duty in connection with the fee arrangements between them in allegedly making unauthorised deductions from the monies held for IDL in its client account. IDL claims the principal sum of £337,525. TKP disputes the claim and seeks to set off further sums which it claims are due to it from IDL. The trial of the action is presently due to take place later this year although I was told by counsel at the hearing that it may be postponed until next year.

4. By an application notice dated 3 October 2018, TKP applied pursuant to CPR Part 25.12 for security for its costs of the proceedings in the sum of £500,000 or such other sum to the court's satisfaction by payment into court or in such other manner as the court may direct. The application was supported by witness statements dated 3 October 2018 and 5 December 2018 of Rao Hassan Khan, a partner in TKP, and opposed by a witness statement dated 12 November 2018 of Jonathan William Allan Child, a solicitor employed at Candey Limited ("Candey"), the law firm which represents IDL in these proceedings. In its evidence, TKP indicated that a deed of indemnity would be an acceptable form of security.

5. On 11 December 2018, Chief Master Marsh ordered *inter alia* that IDL should provide security in the sum of £350,000 by the provision of a proposed deed of indemnity to TKP by 19 December 2018; that, if no proposed deed of indemnity was provided by that date, IDL should provide security by payment of that sum into court by 31 December 2018, failing which all further proceedings would be stayed; and that if a proposed deed of indemnity was provided but was not acceptable to TKP, all further proceedings would be stayed pending further order following a further hearing. The deadline of 19 December 2018 was subsequently extended by a further order of the court to 24 December 2018. Although not spelled out in Chief Master Marsh's order, it is common ground between the parties that the reference to the acceptability of the proposed deed of indemnity must mean its reasonable acceptability. There was no appeal against Chief Master Marsh's order.

6. On 24 December 2018, Candey sent TKP a copy of the proposed deed of indemnity. There then followed, over the course of the next several months, extensive correspondence between the parties and with the court on the precise terms of the proposed deed of indemnity, which was eventually agreed, and other matters.

However, on 15 February 2019, IDL informed TKP that it would be seeking from TKP the costs of the premium for the deed of indemnity. Also, on 18 March 2019, IDL informed TKP that the increased costs of its ATE policy, which had first been notified to TKP on 24 November 2014 and would be topped up from £180,000 to £350,000, would also be sought to be recovered from TKP. The total costs in question amount to £315,000, comprising the original £120,000 premium for the original cover of £180,000, plus an additional £195,000 for the topped up ATE policy and associated deed of indemnity. As Candey explained in a letter dated 1 April 2019 to TKP, "*the Deed of Indemnity cannot be provided without a commensurate increase to the ATE Policy because the Insurer cannot provide a Deed of Indemnity for an amount higher than the insured amount*".

7. TKP took the view that the deed of indemnity was unacceptable. This was not, as is often the case, because of the terms of the proposed security but because of the TKP's potential liability for the costs of the premium for it if it was unsuccessful at trial. The matter came before the master at a case management conference on 22 May 2019 at which he ordered that the deed of indemnity was adequate and acceptable security. TKP now appeals against that order and seeks instead an order that the security be provided by means of a payment into court. By a respondent's notice, IDL seeks to uphold the master's order on the additional grounds to those relied on by him that it is a company in administration with limited means and that, even if the master was wrong to have excluded from consideration TKP's potential liability for the costs of the premium, in the exercise afresh of the court's discretion the same order should be made as that made by the master.

8. CPR Part 25.12(3)(b)(i) provides that where the court makes an order for security for costs, it will direct the manner in which the security must be given. CPR Part 25.13(1)(a) provides that the court may make an order for security for costs under rule 25.12 if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. The same approach should be taken to the determination of the manner in which security for costs should be given as to the determination of whether an order for security for costs should be ordered at all, see *Recovery Partners GB Ltd v Rukhadze* [2018] EWHC 95 (Comm) at [17] where the deputy judge stated "*if, on an application for security, two different forms of security would provide equal protection to the defendant, the court should, all else being equal, order the form which is least onerous to the claimant*".

9. The issue which arises on this appeal is whether, in considering the acceptability of the deed of indemnity, the amount and potential recoverability of the premium from TKP was not a relevant factor. The master held that it was not relevant and excluded it from consideration.

10. Mr Dan Stacey, who appears for TKP, submitted that the master was wrong to have concluded that it was not a relevant factor since it formed part of the circumstances of the case, to all of which regard has to be had; and that, had the master taken that factor into account, he should have ordered that security be provided by payment into court of the sum of £350,000. He submitted that the effect of the master's decision was to place TKP in a disadvantageous position because, in order for it to obtain the security for its costs to which it was entitled, its potential liability for IDL's costs was being significantly increased. The effect of the master's order would be to increase TKP's

potential costs exposure from £421,851 (being £301,851 in respect of IDL's costs budget plus the £120,000 original premium for the ATE policy) to £616,000 as the result of the additional payment of £195,000 for the topped up cover and the deed of indemnity.

11. In his *ex tempore* judgment, the master said that the circumstances which the court might take into account in determining whether to order security for costs:

> "*12. … are well known* [and] *essentially relate to the injustice or otherwise on a claimant who is being asked to provide security. The unusual feature raised by TKP's position in this case is that the provision of security at a hefty cost is a factor which creates unfairness for TKP as the party seeking the security. Is it just, in effect, TKP asks, that it should accept security having regard to the circumstances in the case and, in particular, the circumstance that it may face a much larger costs bill at the end of the day.*
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> *13. I have not found this a particularly straightforward question to answer but after carefully considering the submissions made to me by counsel on both sides and considering the authorities shown to me, I have reached the conclusion that it may be disadvantageous to TKP but it is not unjust that they receive their security at a potential cost at the end of the day. First, the object of the provision of security is to secure the party seeking security against the risk that it will win its case but be unable to recover its costs, and I emphasise 'its costs', from the unsuccessful party at the end of the proceedings. The provision of security included in this case will have satisfied that concern because TKP will by the deed of indemnity be enabled to recover its costs of the claim up to £350,000. If TKP's defence is successful, it will not be ordered to pay the damages sought in the claim and it will be most unlikely to be ordered to pay any part of the costs of topping up IDL's ATE insurance.*
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> *14. Should I then take into account that if TKP loses the claim it may then face a larger costs bill and, in particular, should that be taken into account on its application for security for costs? …* "

12. The master then went on in his judgment to consider how the addition to TKP's costs had come about and concluded, in paragraph 16, that "*that the disadvantage incurred by TKP, if such it is, of facing a larger costs exposure has come about, in reality, by the funding regime which permits it rather than by the operation of the security for costs regime…* ".

13. Mr Albert Sampson, who appears for IDL, submitted that the master correctly treated the existence, amount and potential recoverability of the premium as not relevant. In reliance on *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, at 540a-d, and *Fernhill Mining Ltd v Kier Construction Ltd* [2000] CP Rep 69 at [52], he drew attention to the purpose of ordering security for a defendant's costs being to protect a party in whose favour it is made against the risk of being unable to enforce any costs order that may later be made and the need for the court to carry out a balancing exercise between the injustice caused to a claimant if he is prevented from or hindered in pursuing a proper claim and the injustice to the defendant if no security is ordered and the defendant succeeds at trial but is unable to recover his costs. He

submitted that the existence, amount and potential recoverability of the premium was not relevant when considering that purpose.

14. Further, it is a general principle applicable to security for costs applications that security should be provided in the way least onerous to the provider, *Recovery Partners GB Ltd v Rukhadze*, above, at [34].

15. I accept that those are the principles which should apply in the present case. Applying them, I consider that the master was correct not to have taken into account the amount and potential recoverability of the premium from TKP. The relevant questions for the court were whether the deed of indemnity would in fact give TKP real or adequate security for its costs and whether making the order would prevent IDL from pursuing its claim. The answer to the first question was yes and the answer to the second was no. TKP's potential liability for the premium for the deed of indemnity was not relevant to those questions. In my judgment, the master's order was correct.

16. Mr Stacey drew attention to the statement of Parker LJ in the practice note in *Rosengrens Ltd v Safe Deposit Ltd* [1984] 1 WLR 1334, at 1337C, that "[s]*o long as the opposite party can be adequately protected, it is right and proper that the security should be given in a way which is the least disadvantageous to the party giving that security*". I do not accept his submission that the expression "*adequately protected*" in that passage involves consideration of the defendant's potential exposure in costs if the defendant is unsuccessful in the litigation. Nor do I accept his submission that the defendant's potential exposure in costs if unsuccessful in the litigation is required by the expression "*all else being equal*" in the passage from the judgment in *Recovery Partners GB Ltd* referred to in paragraph 8 above.

17. In that connection, it is necessary to say a word about the scope of the hearing before the master. The issue before him was confined to whether TKP's potential liability for the premium for the deed of indemnity rendered the deed of indemnity unacceptable. If the answer was no, as the master determined, then provision for security in that form had already been ordered by Chief Master Marsh. In accordance with that order, the provision of security by the alternative means of a payment into court was only required if the deed of indemnity was not acceptable security. As I have said, there was no appeal against Chief Master Marsh's order. In those circumstances, I do not consider that the master can be criticised for not having given any or any adequate weight to IDL's ability to provide security by a payment into court, which is one of the matters relied on in the grounds of appeal.

18. For the above reasons, the appeal is dismissed.

19. Since, as I have concluded, the master did not exercise his discretion wrongly or wrongly fetter his discretion, the question whether this court should, in the exercise afresh of its discretion, make the same or a different order does not arise. Mr Stacey submitted that the exercise would in substance be a matter of balancing the merits of the deed of indemnity as the security for TKP's costs and the merits of a payment into court. In the light of Chief Master Marsh's order, I am not convinced that this is what the exercise would have involved. The question would have been whether, taking into account the amount and potential recoverability of the premium from TKP, the deed of indemnity was acceptable security, without regard to the merits of a payment into

court. Had the question arisen, I would have been minded to uphold the master's order. However, for the reason I have indicated, it is unnecessary to reach a conclusion on those matters.